

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Reclassification of License of)	
FM Station KJEL)	RM-10567
(Lebanon, Missouri))	
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 2005

Released: June 24, 2005

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Reconsideration filed by Four Him Enterprises, LLC (“Four Him”) directed to the staff letter returning a Petition for Rule Making.¹ Ozark Broadcasting, Inc. (“Ozark Broadcasting”) filed an Opposition to Petition for Reconsideration and Four Him filed a Reply. For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. Four Him, licensee of Station KHZR (formerly KHCR), Channel 249C3, Potosi, Missouri, filed a Petition for Rule Making proposing the substitution of Channel 249C2 for Channel 249C3 at Potosi, and modification of the Station KHZR license to specify operation on Channel 249C2. In order to accommodate this upgrade, Four Him proposed channel substitutions at Rolla and Linn, Missouri. In turn, the proposed Channel 276A substitution at Rolla required the reclassification of Station KJEL, Channel 279C, Lebanon, Missouri, to Channel 279C0. To this end and pursuant to Section 316(a) of the Act and Section 1.87 of the Commission’s rules, we issued an *Order to Show Cause* directed to Ozark Broadcasting, licensee of Station KJEL, to show cause why the Station KJEL license should not be reclassified to specify operation on Channel 279C0 in order to accommodate the channel substitution at Rolla and the upgrade at Potosi.

3. As required by the *Order to Show Cause* directed the staff to mail Section 1.87 of the Commission’s rules, a copy of the *Order to Show Cause* to Ozark Broadcasting by certified mail, return receipt requested. There is no evidence that this mailing was accomplished. The *Order to Show Cause* set forth an October 21, 2002, response date. Ozark Broadcasting did not file a timely response to the *Order to Show Cause*. Instead, Ozark Broadcasting filed a Motion to Accept Late-Filed Opposition and an Opposition to Order to Show Cause on November 5, 2002. In the Motion, Ozark Broadcasting stated that it had no actual notice of the *Order to Show Cause* and requested 180 days to file an application to maintain Class C status. Thereafter, Ozark Broadcasting filed an acceptable application specifying

¹ Letter from John A. Karousos, Assistant Chief, Audio Division, to A. Wray Fitch, III (August 1, 2003).

minimum Class C facilities.² On August 1, 2003, we dismissed the Petition for Rule Making.

3. In its Petition for Reconsideration directed to that dismissal, Four Him argues that Ozark Broadcasting had “constructive notice” of the *Order to Show Cause* because it was included in the Commission’s public notices released September 20, 2002, and that Ozark Broadcasting could have ascertained its existence through “the exercise of reasonable diligence.” As such, Four Him contends that Ozark Broadcasting did not file a timely response and that we should not have considered the Opposition to Order to Show Cause and dismissed its Petition for Rule Making. Four Him also argues that unlike Section 312(c) of the Act which requires the Commission to “serve” a copy of an Order to Show Cause on a licensee before revoking a license or permit, Section 316(a)(1) does not contain such a requirement and thus does not require “actual notice” before modifying a license or permit.³

4. We deny the Petition for Reconsideration. There is nothing in the record of this proceeding which would suggest that either Ozark Broadcasting or its counsel had actual notice before November 4, 2002, of the *Order to Show Cause* or the October 21, 2002, date to file a response. An argument that constructive notice is sufficient in this situation is without merit. Ozark Broadcasting has a statutory right to be notified of the proposed modification of the Station KJEL license and an opportunity to file a response.⁴ In this regard, Section 316(a)(1) of the Act specifically requires that the licensee be “notified in writing” of the proposed modification and Section 1.87 of the rules implements this requirement by requiring that an Order to Show Cause to be mailed to the licensee by certified mail, return receipt requested. The fact that Ozark Broadcasting did not ascertain the adoption of the *Order to Show Cause* in a Commission public notice released September 20, 2002, does not obviate compliance with Section 316(a)(1) of the Act or negate our responsibility to comply with Section 1.87 of the rules.

5. Because we did not provide Ozark Broadcasting with the requisite notice, we would normally reissue an *Order to Show Cause* with a new date to file a response. In this situation, dismissal of the Four Him Petition for Rule Making was the appropriate action. If we were to reissue the *Order to Show Cause*, Ozark Broadcasting would be afforded 30 days to respond and indicate that it would file an application within six months. Once an application is accepted for filing, the underlying petition for rule making is dismissed.⁵ In this proceeding, Ozark Broadcasting has already filed an acceptable application specifying minimum Class C facilities. As such, it would serve no purpose to reissue an *Order to Show Cause* and further delay resolution of this proceeding.

6. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by the Four Him Enterprises, LLC IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

² File No. BPH-20030401ABZ.

³ 47 U.S.C. §312(c) and §316(a)(1).

⁴ See *Fostering the Expanded Use of UHF Television Channels (Stockton and Modesto, California)*, 4 FCC 2d 839 (1966).

⁵ See Note 2 to Section 1.420(g) of the rules; see also *Second Report and Order in 1998 Biennial Regulatory Review-Streamlining of Radio Technical Rules in Part 73 and 74 of the Commission’s Rules*, 15 FCC Rcd 21649 (2000).

8. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau